No. 83-998

In the Supreme Court of the United States

October Term, 1983

FOLEY CONSTRUCTION COMPANY, PETITIONER

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

# REPLY TO MEMORANDUM OF RESPONDENTS IN OPPOSITION

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REPLY BRIEF

TO

MEMORANDUM FOR THE FEDERAL

RESPONDENTS IN OPPOSITION

This Reply Brief is filed with the United States Supreme Court pursuant to Rule 24.4 of the Rules of the United States Supreme Court.

The Solicitor General of the Department of Justice of the United States of America in his "Memorandum for the Federal Respondents in Opposition" to Petitioner's Petition for Writ of Certiorari from the decision of the United States Court of Appeals for the Eighth Circuit, filed March, 1984, incorrectly and misleadingly imputes and suggests that (1) Petitioner's argument inter alia before this court is that "the Government position was not substantially justified,"

simply because "it" lost the case. (Respondent's Mem. p. 5 par. 2) (Emphasis Added). The Solicitor General further mistakenly maintains that, (2) "Petitioner's contention is nothing more than an assertion that because the Corps did not prevail on the merits of the case, it's position must have been unreasonable" (Respondent's Mem. p. 5). Petitioner's argument before this Court cannot and should not be reduced to such simplistic phraseology.

I.

More accurately stated, Petitioner is seriously representing to this Court that there existed as a matter of fact and law "unreasonable Government action involved" which directly caused Petitioner to assume and be burdened with a costly prosecution of this case. True,

Petitioner ultimately prevailed, but Respondents did not endeavor to appeal that Order, and they therefore must accept it in spite of their statements contained in Memorandum suggesting that Petitioner was neither entitled to (1) equitable relief or (2) award of the Contract. (See Respondent's Memo. pp. 4-5).

The Petitioner herein submits to this Court that this case represents the very type of situation and scenario contemplated and specifically addressed by the Congress when it enacted the Equal Access to Justice Act, 28 U.S.C. (Supp V) 2412.

II.

Prior to and at the time of the award of the Contract in question, let by the Army Corps of Engineers February 23, 1982, Respondent had actual knowledge of

the fact that Petitioner had challenged and would continue to appeal the status and eligibility of Herbison Construction Company as a qualified and eligible bidder pursuant to the Small Business Administration Set-Aside Program; a program that encourages small business firms to bid for government contracts (See, 10 U.S.C. 2301(b)).

Petitioner made it expressly known as a matter of record at all times material hereto to the Respondent that Herbison Construction Company was a sham corporation and an alter ego of Park Construction Company, an ineligible bidder under the Small Business Set-Aside Program. The Size Appeals Board for the Small Business Administration, which constitutes the final administrative review forum in such matters,[1/] expressly affirmed

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1/ Midwest Construction Co. vs. United States 387 F. 2d at 960

Petitioner's position with respect to Herbison Construction Company on April 22, 1982 (Pet. Appx. 40).

On May 7, 1982, the United States District Court for the Southern District of Iowa entered a permanent injunction against the Corps and other Respondents ruling that the award of the Contract to Herbison without waiting for an SBA Size Appeal Board determination constituted "clear illegality". (Pet. Appx. at pp. 43-62 and Respon. Mem. p. 3). The District Court then awarded the contract to the Petitioner, who at the time of this writing continues to perform satisfactorily thereon.

III.

Of particular importance and significance in this appeal and a matter that has not been addressed by the Respondents

and has thus been ignored, are the undisputed and uncontroverted facts abundantly clear in the record which established that Respondent Corps had actual knowledge of Petitioner's documented challenge and appeal of Herbison's eligibility as a bidder at all times before, during and after the award of the Contract. Directly and defiantly in the face of all the known facts, the Corps steadfastly did nothing to preserve, maintain or support the "intent" of the Small Business Act, but rather chose to threaten Petitioner's attorney, a matter of record and unrebutted testimony of March 26, 1982, made on or about January 8, 1982, that if they (Petitioner) continued their protests and appeals, the Corps would make Petitioner "jump through the hoops". Unfortunately, Respondents were correct

in their assertion and their prophecy was self-fulfilling. Respondent with actual notice of these matters had thus unilaterally, completely and effectively frustrated the Petitioner's right to due process as well as participation in a bid the express purpose and congressional mandate for which the SBA Set-Aside Program was established.

Most regrettably for all concerned, Respondent Corps' actions were not only unreasonable but further demonstrated an arrogance and prejudice that clearly established an utter disregard of the legitimate public interest in this matter and a lack of good faith effort to protect or respect the legitimate interests and rights of the parties involved herein, not to mention the public interest expressly dictated and mandated by the Congress of the United

States of America.

IV.

Respondents tell us that according to the United States Court of Appeals for the Eighth Circuit that "the interest of the Government and the public in a procurement process unfettered by delay" is of some significance. (Respondent's Memo. p. 3). But the Respondents have totally overlooked and disregarded the unreasonable delay caused by a fraudulent and ineligible bidder and the resultant frustration of the Congressional mandate and public interest as manifested and expressed by the SBA Act. The District Court determined as a matter of record that the project could be performed by the Petitioner within the original project time scheduled, before issuing its injunction and awarding the contract to Petitioner.

(Pet. Appx. pp. 56-60). Accordingly, any delays occasioned by the Petitioner in this matter have been without significance or materiality.

A simple and undisputed fact is that Respondent Corps was put on notice as to Herbison's status as an ineligible bidder in a timely fashion by the petitioner. Respondent with this knowledge capriciously, arbitrarily and in willful defiance and by a belligerent course of conduct toward the Petitioner and public, and in violation of his procurement regulations as set forth in Petitioner's Petition for a Writ of Certiorari, (Pet. Writ Appx. p. 20) did not "declare an emergency" in writing, (Pet. Writ Cert. Pet. p.22), and did nothing in an endeavor to confirm or refute Petitioner's notice of appeal. Respondent did however "rush" to award the Contract to Herbison

on February 23, 1982 without investigation of Petitioner's claims and without notice to it. The Corps knew and had every reason to believe that Petitioner would pursue its appeal to the Size Appeals Board of the Small Business Administration in Washington, D.C. Respondent Corps' was obligated by law according to (its own) Procurement Regulations to declare in writing that an emergency existed prior to making the award or await final decision of SBA. (Pet. Appx. pp. 50, 51). There is nothing further in the record which would indicate as a matter of fact that an emergency existed and, accordingly, Respondent Corps' actions were unnecessary, precipitous and violated Procurement regulations.

V.

Apart from the above stated considerations involving the procurement process, the Corps at all times material hereto, before, during, and after the award had at it's immediate disposal and attention as a matter of record sufficient facts and information concerning the eligibility of Herbison as a qualified bidder. Any reasonable person with such knowledge would be put on both actual and constructive notice that the strong possibility, if not probability and likelihood, was, that Herbison was a sham corporation and an ineligible and unqualified bidder. The bid documents expressly required that each bidder must be qualified in all respects to perform the work. The Corps knew or should have known that Herbison had performed no construction work or engaged in any busi-

ness for several years prior to the letting in question, and that Herbison stated to the Corps its net worth at $65,000.00. Testimony adduced at the trial indicated, if not clearly demonstrated, that even Herbison's net worth was a serious inflated figure. The Corps remained doggedly on course and did nothing. There's not a Court of competent jurisdiction in this country that would not take judicial notice of the fact that a construction company with a net worth of $65,000.00 or less would be unable to perform a major multi-million dollar levee construction project on the Mississippi River, let alone meet its initial payroll obligations.

Had the Corps acted reasonably or in good faith, a simple phone call from the Corps to Herbison or a preliminary or

even cursory field audit, visit or investigation would have immediately disclosed these facts.

Testimony taken on March 26, 1982 in District Court of Mr. Olson, the alleged vice-president of Herbison, clearly disclosed the obvious sham and fraud perpetuated upon the Corps and public. A five minute phone call from the Corps would have elicited the same damning information. The Corps as a matter of record never made any attempt to explain its lack of attention or interest in these matters, or deliberate disregard thereof.

VI.

Petitioner respectively submits to the Supreme Court of the United States that the juxtaposition of stated facts, circumstances, conclusions and governing law would not support the conclusion that

Respondent's actions were reasonable, but rather that they constituted unreasonable and unjustified governmental action creating a nexus of facts and circumstances in fact and law for which Congress expressly provided that Petitioner is one to be included in a class of persons entitled to relief, restitution and redress under the Equal Access to Justice Act. See Photodata, Inc. v. Sawyer, 533 F. Supp. 348 (D.C.)

It should further be noted that although the various Circuit Courts have endeavored to interpret the Equal Access to Justice Act, administrative agencies continue to ignore this statute and deny restitution, and the Supreme Court has yet to hear a cause involving the Equal Access to Justice Act. At page 5 of Respondent's Memorandum, the following

statement is presented to this Court:

> "The overwhelming body of Federal case law supports the position that even in the presence of 'clear illegality' a company has no right to a federal contract."

However, the cases cited by Respondents involve factual situations wherein performance under these contracts had either already commenced, or, the facts did not warrant injunctive relief, or there was no finding by the Court of "clearly illegal" activity on the part of the Government. The Foley case is entirely distinguishable from those cited by Respondents. Only an "award" of the contract had been made, and no performance had commenced under the contract. The District Court determined that there would be no prejudice to the City of Burlington, Iowa, or the public if the project was awarded to the Peti-

tioner. (Pet. Appx. pp. 56-58). Furthermore, Respondents herein did not appeal that part of the Foley decision.

Respondents seem preoccupied with the Iconco v. Jensen Construction Co., case as somehow undermining the authority of the case at bar, Iconco v. Jensen Construction Co., 622 F. 2d 1291 (8th Cir. 1980). It should be noted, however, that Iconco, is a 1980 decision by the Eighth Circuit affirming Judge O'Brien's decision in the lower court. The same Judge O'Brien rejected the doctrine of Iconco in this case as failing to provide an adequate remedy at law (Pet. Appx. p. 63), and, thereafter, fashioned his decision in the Foley Construction Company case as one where irreparable harm would ensue.

Respondents cite several cases on page 5 of their Memorandum in Opposition

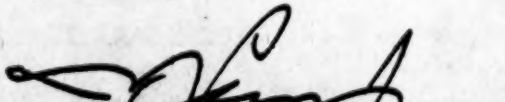
which purportedly stand for the proposition that Petitioner had no right to the contract even in the presence of "clear illegality". None of the cases stand for such a proposition and each is distinguishable on its facts. Each case can be read to support Petitioner's right to an award of the contract under its unique facts. Cincinnati Electronics Corp. v. Kleppe, 509 F. 2d at 934 comments in dicta:

> We emphasize that this case does not involve a situation where a dissatisfied bidder has persuaded a court to direct the procuring agency either to award a contract to that bidder or to cancel an award made to one another. In those circumstances the result might be different, but we intimate no opinion on that question at this time.

## CONCLUSION

Reduced to its essence, Respondents' actions were neither reasonable or justified as a matter of fact and law; (the Petition for Writ of Certiorari should be granted) and an award of attorney fees should be made to the Petitioner herein.

Respectfully Submitted,



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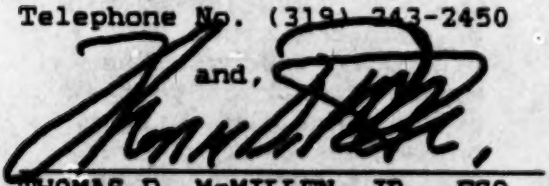

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CERTIFICATE OF SERVICE

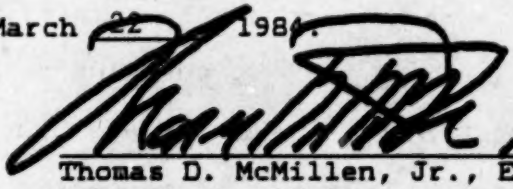
I, Thomas D. McMillen, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Foley Construction Company, Petitioner Herein, hereby certify that on March 22, 1984, pursuant to Rule 28.5(b), Rules of Supreme Court, I served three (3) copies of the attached Reply to Memorandum of Respondents in Opposition on each of the parties herein, as follows:

On the United States of America, Respondent herein, by depositing such copies with Federal Express, Clinton, Iowa, with tariff pre-paid, properly addressed to the post office address of the Solicitor General of the United States, Rex E. Lee, above-named Respon-

dents' counsel of record, at: Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated March 22, 1984.



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